IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 702 of 2002
with
F.A. Nos. 704/2002, 709/2002, 1020/2002, 1021/2002, 1022/2002, 1023/2002, 1024/2002, 1025/2002, 1026/2002, 1027/2002, 1028/2002, 1029/2002, 1030/2002, 1031/2002, 1032/2002 and 432/2002
with
Civil Application No. 1559 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

BABUBHAI MAGANBHAI PATANWADIA (DECD.) THRO' HEIRS & LRS
Versus
REGINOAL DIRECTOR

Appearance:
1. First Appeal No. 702 of 2002
MR SUBRAMANIAM IYER for Petitioner No. 1-1/1
MR SHASHIKANT S GADE for Respondent No. 1

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: /07/2002

C.A.V. JUDGEMENT

1. Heirs and legal representatives of deceased Babubhai Maganbhai Patanwadia have filed First Appeal against the judgement and award dated 8.1.2002 passed by the Employees State Insurance (hereinafter referred to as HSI') Court in Second Appeal No. 16 of 1999. The E.S.I. Court has held that when deceased Babubhai Maganbhai Patanwadia was working with Alembic Glass he was suffering from the disease of silicosis and that the deceased had 60% disability.

2. The facts giving rise to these appeals are as under:

2.1 The learned counsel for the original appellant late Shri Babubhai Maganbhai Patanwadia submits that the appellant was serving in Alembic Glass Industries Limited, Vadodara since more than 10 years. In view of his employment he suffered an ailment of silicosis. The original appellant was examined by the Medical Board on 12.3.1986. The Medical Board awarded 10% disability. The appellant has produced copy of the order passed by the Medical Board at Annexure-A to the appeal.

2.2 Being aggrieved and dissatisfied with the said order, the appellant filed appeal before the Medical Appeal Tribunal being Appeal (MAT) No. 10/1994. The Medical Appeal Tribunal by its judgement and order dated 15.9.1995 partly allowed the appeal and held that the appellant had disability of 30%.

2.3 Being aggrieved and dissatisfied with the said order, the deceased Babubhai Maganbhai Patanwadia filed ESI Second Appeal No. 16 of 1999 before the ESI Court, Vadodara. ESI Court, Vadodara, by its judgement and order dated 8.1.2002 partly allowed the appeal and held that the deceased Babubhai Maganbhai Patanwadia has 60% permanent disability from 1.1.1990 and he has been given all benefits upto 25.10.1998 and thereafter all the benefits were given to his heirs and legal representatives.

2.4 Being aggrieved and dissatisfied with the aforesaid order of the ESI Court, Babubhai Maganbhai Patanwadia has filed the present appeal under Section 82 of the Employees State Insurance Act, 1948 before this court on 27.2.2002.

2.5 Mr. S.H. Iyer, learned counsel for the

appellant, has invited my attention to Rule 57 of the Employees' State Insurance (Central) Rules, 1950 which provides disablement benefits. The relevant provisions of the said Rule read as under:

"(1) A person shall be qualified to claim disablement benefits for temporary disablement for not less than three days (excluding the day of accident) for the period of such disablement sustained as an employee under the Act.

"(2) A person shall be qualified to claim periodical payment for permanent disablement sustained as an employee under the Act, whether total or partial, for such disablement;

Provided that where permanent disablement, whether total or partial, has been assessed provisionally for a limited or finally, the benefit provided under this rule shall be payable for that limit period, or as the case may be, for life.

(3) xxxxxxxxxx

Explanation - The disablement benefit calculated as aforesaid shall be called the "full rate"

(4) The disablement benefits shall be payable to the insured person as follows:

(a) for temporary disablement, at the full rate;

(b) for permanent total disablement, at the full rate;

(c) for permanent partial disablement resulting from an injury specified in Part II of the Second Schedule, at such percentage of the full rate which would have been payable in the case of permanent total disablement, as specified in the said Schedule as being the percentage of the loss of earning capacity caused by the injury."

2.6 On the basis of the above, the learned counsel for the appellant has submitted that in this case also the appellants must get benefit for the permanent total disablement at 100% (hundred percent).

3. Mr. S.H. Iyer, learned advocate for the appellant, appeared. He has submitted that the aforesaid award of the learned judge of the ESI Court is contrary to and inconsistent with the judgement of this court in First Appeal No. 3449 of 1999 and this court (Coram: K.R. Vyas, J) by judgement dated 26.10.1999 decided the issue.

3.1 The learned counsel for the appellant has invited my attention to the following salient features of the judgement of this court as under:-

3.2 The court was concerned with the disability of the workmen ranging from 70% to 90% granted by the E.S.I. court and whether the workmen are entitled to 100% disability. In that case also the workmen were working in Alembic Glass Industries Limited at Vadodara. They were working in Crushing Plant and such other sections where various chemicals and minerals like Dolomite, Silica, quarry etc. are being crushed and used for manufacturing glass articles. Due to inhalation of mineral particles, the workmen contracted a dreaded disease known as Silicosis' making it difficult for the workmen to survive. In that case my learned brother Mr. Justice K.R. Vyas has considered the contention of the appellants and also contention of the E.S.I. Corporation. This court has considered the principles of Internal Medicine by Harrison, 12th Edition, Vol. II, about Silicosis reported in July 1993 issue of Bulletin "Occupational Health and Safety". This court has also considered the relevant provisions of the Act which provide the definition of employment injury, permanent partial disablement and also certain regulations. In para 7 of the said judgement the court observed thus:

"In view of the aforesaid material on record, it is clear that amongst the occupational diseases, silicosis is the major cause of permanent disability and mortality and it is caused by inhalation of dust containing silica and silicon dioxide and there is no effective treatment for silicosis. Fibrotic changes which have already taken place cannot be reversed. It is also clear that silicosis can be controlled before it is being contracted by rigorous dust control measures or by regular physical examination of the workers, but once it is contracted, there is no effective treatment for it and the person has to die. There is no dispute with regard to the

fact that all the 54 workers have been diagnosed as the patients of silicosis."

3.3 This court has also considered the Act, Rules and Regulations and in para 9 on page Nos. 16-17 observed thus:

"The possibility of contracting silicosis increases by inhaling the powder of the dust. According to him, the dust particles deposit in the lungs with the result that the heart weakens and it also affects the liver as well as kidney. The patient is also not in a position to do his work. Day by day, the life span decreases. According to him, Harrison's Principle & Internal Medicine is a standard book as far as the disease silicosis is concerned. He has assessed the disability of the workmen to the extent of 60% to 70%. there are all possibilities that the patients may die within a year or two. In the cross-examination, his attention was invited to the report of the medical board wherein 20% disability has been assessed, to which he has stated that he is not prepared to say that the same is not correct. In view of this oral as well as documentary evidence on record, the ESI court recorded a finding that the disease silicosis is an incurable disease. This being a peculiar disease, even though the ESI court has recorded that the concerned workmen are entitled to compensation for 100% disability, however, in the final order, the disability was assessed to the extent of 80% to 90%. In any case, on appreciation of evidence on record, once such a finding is recorded, it cannot be contended that it is a case of "no evidence". Admittedly, in the instant case, all the 54 workmen contracted silicosis which is an incurable disease and in the course of time, its adverse effects increase and ultimately leads to death and, therefore, it cannot be contended that the disablement is for a limited period but it continues throughout the life."

3.4 The ESI court has considered zero percent disability in some cases and in some other cases partial disability. In spite of that finding, this court has given 100% (hundred percent) disability in First Appeal No. 3449 of 1999.

3.5 Again on pages 21-23 in paragraphs 11 the court

observed as under:

"True, under Section 54 of the Act, the medical board can determine the question of disablement whenever such a question arises as to whether the relevant accident has resulted into permanent disablement or the extent of loss of earning capacity provisionally or finally and the assessment of the proportion of the loss of earning capacity etc. and even Section 55 of the Act gives power to the medical board and the Medical Appellate Tribunal to review their own previous decisions once it is pointed out that the injury or the disease has aggravated. ordinarily, it should be left to the discretion of the medical board to determine the question involved under Section 54 and in a given case, under Section 55, but there are cases and cases of accident and disease. As far as accidental injuries are concerned, Schedule II of the Act prescribes for description of injuries and percentage of loss of earning capacity. The medical board can certainly determine the question of disablement in the light of what is provided under the Act. Even after determining the said question, if at all there is any aggravation of the injury, the concerned workman can certainly apply for review under Section 55. Similarly, in the case of occupational disease also, it can be decided under section 54 and can also be reviewed under Section 55, but once it is declared that the disease is incurable, then is it necessary to determine the question of disablement in a case of incurable disease? It is a permanent disablement and the patient is bound to reduce his earning capacity. Since the employee has contracted an incurable disease, it is bound to aggravate and, therefore, all these questions which are required to be determined by the medical board or the Medical Appellate Tribunal, it is nothing but an empty formality. The only exception that can be made in the case of an incurable disease is only when a finding is recorded that such a disease is controllable. In the present days, when medical facilities are available, all the diseases are practically curable. However, there are still certain diseases for which no cure is invented. From the evidence on record, it is clear that the disease Silicosis is one of such diseases. In the circumstances, even though there are certain

> provisions which are required to be followed, but by asking the patient suffering from an incurable disease to apply before the medical board to find out as to whether he has suffered a permanent disablement or not or whether he has lost his earning capacity or not and whether his disease has aggravated or not is nothing but a cruel joke to him. It is stated at the bar that out of 54 workers who sustained silicosis, 14 have already expired during the pendency of the proceedings. This would go to suggest that silicosis is incurable and uncontrollable. This court cann't shut its eyes to the seriousness of the disease and insists that the works must follow the provisions by applying again and again to the medical board to review their decision when the death is inevitable. This Act which is a benevolent legislation is for the benefit of the workmen and all the interpretations of the enactments are required to be interpreted with a broader outlook. The court must desist itself from accepting technical contentions. Thus none of the submissions of Mr. Shah impressed me and they are required to be rejected."

4. The court ultimately partly allowed the appeals. I have been informed that being aggrieved and dissatisfied with the aforesaid order, E.S.I. Corporation filed Letters Patent Appeal Nos. 1910 to 1964 of 1999 and the Division Bench of this court (Coram: M.R. Calla and R.R. Tripathi, JJ) dismissed all the Letters Patent Appeals by its judgement and order dated 5.10.2000 on the ground that the appeal is not maintainable.

5. Mr. Shashikant Gade, learned counsel for the E.S.I. Corporation has tried to support the order of the E.S.I. Court. He has submitted that it is true that E.S.I. Act is a welfare legislation but all the persons who are working in the Company may not get the same type of disease and therefore the court should make distinction between individual employee depending upon the medical report by which the patients are examined. He has also relied on Special Medical Board report Radiologist in this behalf. He has submitted that the Medical Board has only assessed 30% disability which is an expert body and relying upon that report the Medical Tribunal has given 60% disability and this court may not entertain the appeal. He submitted that degree of disease depends upon medical examination and report of medical expert. When the expert body has opined about

the disease, the court may not interfere with it.

5.1 He has further submitted that in some cases ESI court has assessed disability of the concerned workman due to silicosis ranging from 0% (zero percent) to 90% (ninety percent) with special instructions to workman to remain present before the Special Medical Board to prove percentage of silicosis, if any. He further submitted that four insured persons (petitioners) are having zero percent disability given by the Special Medical Board i.e. no silicosis. He further submitted that eight insured persons (petitioners) refused to approach the Special Medical Board. They must prove that silicosis contracted to them.

5.2 The learned counsel for the ESI Corporation further submitted that ESI court instructed petitioners to appear before the Special Medical Board but the petitioners refused. He further stated that Alembic Glass Industries Limited is closed since 14 years and the petitioners are no more employees of Alembic Glass Industries Ltd., Vadodara. He further submitted that the petitioners are out of hazardous employment since 14 years. Hence the question to be decided is whether occupational disease like silicosis can be contracted to the petitioners after closure of company since 14 years. It is deemed to be no employment injury arising out of and in course of employment or employment injury if it is so cannot be aggravated during 14 years of closure of factory.

5.3 He further submitted that as per Section 2(8) of the ESI Act, for 14 years petitioners have taken fresh air or have worked in other such company and hence, contracted disease, if any. But not appearing before the Special Medical Board is unjust, improper, illegal and contemptuous behaviour of the petitioners in pursuance of ESI court's orders.

5.4 The learned counsel for the ESI Corporation has submitted that silicosis is nothing but tuberculosis developed by silicones. It is not a dreaded disease. it is curable disease. Earlier 108 petitioners are mostly alive, mostly doing full time jobs in other industries and also getting pension i.e. 100% disability compensation from ESI Corporation. This is misuse of welfare and benevolent provision of ESI Act.

5.5 He further submitted that earning capacity of the petitioners is not reduced. On the contrary, they are getting full salary from present employer and 100%

pension from ESI Corporation. He further stated that this court may not entertain the appeal as they do not raise any substantial question of law as per Section 82(A) of the ESI Act. He further submitted that because at present no permanent total disability or no earning capacity reduction, Special Medical Board is constituted under the provisions of ESI Act and Medical Evidence may not be ignored.

5.6 The learned counsel for the ESI Corporation submitted that in some cases there is 60% disability and therefore these cases are not to be considered by this court. He further submitted that out of this group of matters, four matters are having zero percent disability and those may be summarily rejected and not withdrawn as per the desire of the petitioners' advocate. He further submitted that at present some of the petitioners might have crossed age limit of 58 years as retirement from the services. In nut shell, the learned counsel for the ESI Corporation has submitted that as there being no substantial question of law, the matters may be summarily rejected because it changes from person to person basis and not group.

5.7 The learned counsel for the ESI Corporation has further submitted that list of pending matters as follows:

1. C.A. No. 2710/2002 - Delay - Satish Bikhabhai Vs. ESI - First Appeal St. No. 121/2002

2. C.A. No. 2709/2002 - Delay - Ramdulare Ambikaprasad Vs. ESI - First Appeal St. No. 123/2002

3. C.A. No. 2708/2002 - Delay - Dahya Karshan Vs. ESI - First Appeal St. No. 124/2002

4. C.A. No. 2705/2002 - Delay - Talsibhai Bababhai Vs. ESI - First Appeal St. No. 125/2002 -

5.8 The above cases are having zero percent disability by Special Medical Board and hence these appeals should be dismissed in limine.

5. C.A. No. 2721/2002 - Delay - Karshan Dhanji Patel Vs. ESI - First Appeal St. No. 237/2002

6. C.A. No. 2716/2002 - Delay - Babubhai Shahbhai Gohil Vs. ESI - First Appeal St. No. 119/2002

7. C.A. No. 2719/2002 - Delay - Rupali Dhuliabhai Vs. ESI - First Appeal St. No. 234/2002

8. C.A. No. 2720/2000 - Delay - Sultan Ninama Vs. ESI - First Appeal St. No. 236/2002 -

9. C.A. No. 2714/2002 - Delay - Chhitabhai Ranchhodbhai Vs. ESI - First Appeal St. No. 238/2002

10. C.A. No. 2713/2002 - Delay -Mohan Dahya Prajapati Vs. ESI - First Appeal St. No. 618/2002 -

11. C.A. No. 2715/2002 - Delay - Maniben Himatbhai Patanwadia Vs. ESI - First Appeal St. No. 235/2002 -

5.9 In these cases 7 insured persons did not remain present/refused to go to the Special Medical Board and hence these petitioners should be sent to the Special Medical Board for checking of disease of silicosis.

13. F.A. No. 704/2002 - Natvar Chhota Patel Vs. Est

14. F.A. No. 709/2002 - Maganbhai Mahijibhai Gohil (Decd.) through heirs Vs. ESI

15. C.A. No. 2704/2002 - Delay - Dalpat Girdhar Parmar (Deceased through heirs) Vs. ESI - F.A. No. 614/2002

16. C.A. No. 321/2002 - Delay - C.A. No. 1559/2002 - Stay - First Appeal No. 432/2002 - ESI Vs. Babubhai Shahbhai Gohil

5.10 In the above cases delay has been condoned by this court (Coram: A.M. Kapadia, J) on 18.2.2002 and this court has granted stay at 60% disability on 25.2.2002.

5.11 All the above contentions which have been raised by the learned counsel for the respondent ESI Corporation seem to be attractive at first sight but unfortunately these contentions are contrary to and inconsistent with the judgement of this court (Coram: K.R. Vyas, J) delivered on 26.10.1999 in First Appeal No. 3449 of 1999. I have considered the said judgement in detail. In that case the appellants were workmen of Alembic Glass Industries Limited at Vadodara and contracted the same disease. In the present case also the workmen were

working in the same company i.e. Alembic Glass Industries Limited, Vadodara. In that case all possible contentions were raised by senior standing counsel Mr. S.R. Shah for the ESI Corporation. In that case the court considered contention of the learned counsel and Harrison's "Principles of Internal Medicine" about silicosis reported in July 1993 issue of Bulletin "Occupational Health & Safety" in which silicosis has been described as "Mega Aids", the article on Silicosis published with a title "shadow of death".

5.12 I have also considered the submissions of the learned counsel for the respondent E.S.I. Corporation that M/s. Alembic Glass Industries Limited is closed for some years and therefore in any view of the matter, there is no permanent disability of the workmen after the factory is closed and therefore, the appeals filed by the workmen should not be allowed. In this behalf Mr. S.H. Iyer, learned counsel for the appellants has submitted that it is not correct that the factory is closed down but the management of the factory has been taken over by new management and still the factory is working. He further submitted that in this case the workmen have worked in the company and they have suffered permanent total disablement at 100% (hundred percent). He submitted that in another matter before this court (Coram: K.R. Vyas, J), the appellants were working in M/s. Alembic Glass Industries Limited and they were suffering from the same disease and the learned single Judge has given 100% (hundred percent) permanent total disablement. The learned counsel submitted that once the disease has affected the body of workman, the workman has become disablement. Therefore, whether the factory is working or not is not a relevant factor and therefore this court should not consider the contention that whether the factory is working or not.

5.13 I have considered the aforesaid contention of the learned counsel. In my view once the factory is taken over by new management the factory is still working and when the workmen have already worked there and received permanent total disablement in working of the said factory, the damage of the workman has become complete and therefore in any view of the matter the contention of the Corporation that whether the factory is closed down or not, is not relevant factor in this behalf and accordingly that contention of the learned counsel for the Corporation will have to be negatived. Therefore, this contention of the learned counsel for the E.S.I. Corporation is rejected.

6. Mr. Subramaniam Iyer, learned counsel for the appellant submitted that in First Appeal No. 1031 of 2002 though the Medical Board awarded zero percent disability, the Medical Appellate Tribunal has enhanced the disability to 25%. The order of the Medical Appellate Tribunal was challenged before the ESI court in ESI Second Appeal No. 18 of 1999 and the ESI court has awarded 60% disability. In view of the judgement of this court in First Appeal No. 3449 of 1999, I assess disability at 100%.

7. As regards First Appeal No. 432 of 2002, the same has been filed by ESI Corporation against the judgement of the ESI court. In this case , the Medical Appeal Tribunal awarded 60% disability. The order of the Medical Appeal Tribunal was challenged by the workman before the ESI court. The ESI court awarded 100% disability from the date of order of Medical Appeal Tribunal. The workman has filed First Appeal No. 1020 of 2002 for 100% disability to be paid from the date of initial examination by the Medical Board.

8. The ESI Corporation has filed Cross Appeal being First Appeal No. 432 of 2002 against the judgement of the E.S.I. court praying for reduction of disability from 100% to 60%. This court (Coram: A.M. Kapadia, J) admitted First Appeal No. 432/2002 and by way of interim order, directed ESI Corporation to pay 60% disability.

9. In view of the above observations made in this group of matters First Appeal No. 1020 of 2002 filed by the workman is allowed and First Appeal No. 432 of 2002 filed by the ESI Corporation is dismissed. The ESI Corporation is directed to pay 100% disability to the workman from the date of initial examination by the Medical Board.

10. In the result, in view of the judgement of this court, all the appeals filed by the workman are allowed with no order as to costs. The judgement and award passed by the E.S.I. court wherein the ESI court has held that disability is only 60%, is contrary to the judgement of this court which I have referred to earlier and therefore the order of the ESI Court is quashed and set aside. I, therefore, direct that ESI Corporation shall pay 100% disability to the concerned workmen from the date of initial examination by the Medical Board. The ESI Corporation will try to identify the workman and thereafter disburse the amount. The Corporation will report to this court accordingly.

11. In view of the order passed in the main First Appeal, no orders are passed on Civil Application No. 1559 of 2002. Interim relief stands vacated.

(K.M. MEHTA, J)
(pkn)